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The Bail Reform Act of 1984 and *United States v. Salerno*: Too Easy to Believe

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THE BAIL REFORM ACT OF 1984 AND *UNITED STATES V. SALERNO*: TOO EASY TO BELIEVE

CONGRESS enacted the Bail Reform Act[1] in 1984. The Act permits pretrial detention of arrestees based solely on a finding that "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community."[2] The Act, for the first time, allows preventive detention in federal criminal trials. This notion of preventive detention sparked considerable constitutional debate from its inception.[3] The legal, academic, and political communities were quick to examine the ramifications of preventive detention and assess its constitutionality.[4]

In May of 1987, the Supreme Court entered this constitutional debate in *United States v. Salerno*.[5] Chief Justice Rehnquist concluded, in a seven page opinion, that the Act complied

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1. The Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1985 (codified at 18 U.S.C. §§ 3141-3156 (1986)).

2. 18 U.S.C. § 3142(f) (1986).

3. In 1970, Congress enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE ANN. § 23-1322 (1988 Cum. Supp.), calling for the preventive detention of arrestees based on a prediction of future criminal conduct. This was the first serious and successful attempt at such legislation.

4. *See, e.g.*, Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Ervin, *Forward: Preventive Detention — A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291 (1971); Powers, *Detention Under the Federal Bail Reform Act of 1984*, 21 CRIM. L. BULL. 413 (1985); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970); Note, *The Loss of Innocence: Preventive Detention Under the Bail Reform Act of 1984*, 22 AM. CRIM. L. REV. 805 (1985) [hereinafter *Loss of Innocence*]; Note, *Section 3142(e) of the 1984 Bail Reform Act: Rebuttable Presumption or Mandatory Detention?*, 35 BUFFALO L. REV. 693 (1986) [hereinafter *Rebuttable Presumption*]; Note, *As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO L. REV. 1055 (1987) [hereinafter *As Time Goes By*]; Note, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300 (1971) [hereinafter *Empirical Analysis*]; Note, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378 (1987) [hereinafter *Liberty in the Balance*]; Comment, *Preventive Detention: A Constitutional but Ineffective Means of Fighting Pretrial Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439 (1986) [hereinafter *Constitutional but Ineffective*].

5. 481 U.S. 739 (1987). *Salerno* was a six to three decision upholding the Bail Reform Act with separate dissents filed by Justice Stevens and by Justice Marshall in which Justice Brennan joined.

with constitutional requirements.[6] The rather cursory deliberation with which the Court decided the presented issues, however, suggests an eagerness which is inappropriate for considering such a weighty matter as preventive detention. As Justice Marshall stated in his dissent, "[t]he ease with which the conclusion is reached suggests the worthlessness of the achievement."[7] This Note will examine the Court's analysis in *Salerno*, specifically, its cursory determination that preventive detention is not punishment and therefore is not prohibited by the fifth amendment, and that there is no violation of the eighth amendment's right to bail. This Note concludes that these important constitutional issues deserved far greater attention than they were given by the Court.

I. THE BAIL REFORM ACT OF 1984

Congress enacted the Bail Reform Act in response "to the alarming problem of crimes committed by persons on release."[8] Congress believed that "there [was] a small but identifiable group of particularly dangerous defendants"[9] for whom "no condition or combination of conditions [would] reasonably assure the safety of any other person and the community."[10] In order to protect the public from this limited group of arrestees, legislators believed "that the courts must be given the power to deny release pending trial."[11] The Bail Reform Act conferred such "power" on the

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6. *Id.* at 755. *Salerno* raised only two specific claims: violation of the due process clause of the fifth amendment and violation of the excessive bail clause of the eighth amendment.

7. *Id.* at 759 (Marshall, J., dissenting).

8. S. REP. NO. 225, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3185. Legislative history cites two different studies which produced statistics on recidivism. One study reported that one out of six defendants were rearrested and one-third of those rearrestees were rearrested more than once. *Id.* at 6, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3189 (citing LAZAR INSTITUTE, PRETRIAL RELEASE: AN EVALUATION OF DEFENDANT OUTCOMES AND PROGRAM IMPACT 48 (1981)). The second study, evaluating practices in the District of Columbia, found that 13% of felony defendants were rearrested and that 25% of those who were considered "serious bail risks" were rearrested. *Id.* (citing INSTITUTE FOR LAW AND SOCIAL RESEARCH, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA 41 (1980)).

9. *Id.* at 6, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3189.

10. 18 U.S.C. § 3142(f) (1986).

11. S. REP. NO. 225, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3189. This is a sweeping change from the Bail Reform Act of 1966, which stated that "[a]ny person charged with an offense, other than an offense punishable by death, *shall* . . . be ordered released pending trial . . . ." Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (emphasis added), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203, 98 Stat. 1837, 1976.

courts.

Under the Act, the arrestee is brought before a judicial officer who has four possible courses of action. The officer may release the arrestee on his own recognizance or require the execution of an unsecured appearance bond,[12] release the arrestee subject to a condition or combination of conditions,[13] temporarily

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12. 18 U.S.C. § 3142(a)(1) (1986).

13. *Id.* § 3142(a)(2).

Conditions for possible release are provided for in 18 U.S.C. § 3142(c) (1986):

> (1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person —
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> (A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and
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> (B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person —
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> (i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;
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> (ii) maintain employment, or, if unemployed, actively seek employment;
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> (iii) maintain or commence an educational program;
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> (iv) abide by specified restrictions on his personal associations, place of abode, or travel;
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> (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
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> (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
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> (vii) comply with a specified curfew;
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> (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;
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> (ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance . . . without a prescription by a licensed medical practitioner;
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> (x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
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> (xi) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;
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> (xii) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;
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> (xiii) return for custody for specified hours following release for employment, schooling, or other limited purposes; and

detain the arrestee,[14] or detain the individual.[15] Prior to invoking the detention provision, a motion for a detention hearing must be made, unless only temporary detention is being sought. The prosecutor may move for this hearing in a case which involves a crime of violence,[16] an offense which carries a maximum sentence of life imprisonment or death,[17] an offense carrying a maximum term of ten or more years which involves controlled substances,[18] or any felony committed by an individual who already has two or more convictions for crimes which fall into the previously mentioned categories.[19] Either the judicial officer or the prosecutor may move for a detention hearing under circumstances that involve a serious risk of flight,[20] or a serious risk that the arrestee will corrupt the judicial process by either obstructing or attempting to obstruct justice,[21] or by threatening, injuring, or intimidating a possible witness or juror.[22]

Once a motion for a detention hearing is made, the judicial

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

14. 18 U.S.C. § 3142(a)(3) (1986). Temporary detention is used when the judicial officer determines that the offense in question was committed while the person was: on release pending trial for a felony; on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence; on probation or parole; or the person is not a United States citizen or lawfully admitted for permanent residence. Temporary detention may also be invoked if it is determined that the person will flee or pose a danger to any other person or the community. Detention under this provision is not to exceed ten days, excluding weekends and holidays, during which period proper probation or parole officials, law enforcement officials, or immigration officials are to be notified in order to allow for revocation of conditional release, deportation, or exclusion. *Id.* § 3142(d).

15. *Id.* § 3142(a)(4).

16. *Id.* § 3142(f)(1)(A).

"Crime of violence" has been defined by the Act as:

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 3156(a)(4).

17. *Id.* § 3142(f)(1)(B).

18. *Id.* § 3142(f)(1)(C). The provision specifically mentions "the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), [and] section 1 of the Act of September 15, 1980 (21 U.S.C. § 955a)." *Id.*

19. 18 U.S.C.§ 3142(f)(1)(D) (1986).

20. *Id.* § 3142(f)(2)(A).

21. *Id.* § 3142(f)(2)(B).

22. *Id.*

officer must determine whether the arrestee is safe for release or whether society's interest in protection mandates detention. If the case involves a charge for which the prosecutor may move for detention, two rebuttable presumptions arise. The first presumption is that community or personal safety cannot be reasonably assured if release is granted. It arises if the judicial officer finds that: (1) the person has previously been convicted of a crime that could justify a prosecutor's motion,[23] (2) such offense was committed while already on pretrial release,[24] and (3) a period of no more than five years has passed since either that previous conviction or the release from sentencing.[25] The second presumption is that "no condition or combination of conditions will reasonably assure . . . the safety of . . . the community."[26] It arises if the officer determines that there is "probable cause" to believe the arrestee committed a crime punishable by a maximum of ten or more years which involved controlled substances or the use of a deadly weapon.[27]

In making the detention determination, the judicial officer must consider a number of factors[28] including the nature and circumstances of the present charge[29] and the background or "past conduct" of the arrestee.[30] There are a number of procedural safeguards provided to the arrestee in the detention hearing, including

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23. *Id.* § 3142(e)(1). *See supra* notes 16-19 and accompanying text for those crimes justifying a prosecutor's motion.

24. *Id.* § 3142(e)(2).

25. *Id.* § 3142(e)(3).

26. *Id.* § 3142(e).

27. *Id.*

28. These factors are:

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including —

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

Id. § 3142(g)(1)-(4).

29. *Id.* § 3142(g)(1).

30. *Id.* § 3142(g)(3).

the right to counsel, the right to testify, the right to present and cross-examine witnesses, and the right to present information by proffer.[31] A finding of sufficient danger to the community to warrant detention must be supported by "clear and convincing evidence."[32] If the officer reaches this conclusion, he must provide a written detention order incorporating findings of fact and a statement of the reasons behind the conclusion.[33]

II. *United States v. Salerno*

A. Background

Anthony Salerno and Vincent Cafaro were arrested and charged in a twenty-nine count indictment on March 21, 1986. The indictment included one count of conspiracy to violate the Racketeer Influence and Corrupt Organizations Act (RICO), which alleged thirty-five specific acts of racketeering activity. These acts included two conspiracies to commit murder, one count of participating in a racketeering enterprise, one count of wire fraud, eight counts of extortion, one count of illegal bookmaking, and one count of operating an illegal numbers business.[34] Salerno was, in fact, "the longtime don of one of the nation's leading crime families," which made him "the sort of 'dangerous' defendant against whom Congress expected the Act to apply."[35] Although the government believed that the defendants posed no risk

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31. *Id.* § 3142(f).

32. *Id.* Examples of "clear and convincing evidence" are found in United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986) and United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982). The clear and convincing standard was met in *Melendez-Carrion* by evidence which provided a basis for believing the defendants were active members of Los Macheteros, a group identified as a terrorist organization which claimed responsibility for the robbery of a Wells Fargo Bank. *Melendez-Carrion*, 790 F.2d at 994. In *Edwards*, a rape case, the standard was met by evidence of the defendant's fingerprints at the scene of the crime, the recovery of a ring stolen during the rape from a pawnshop where it was pawned in the defendant's name, defendant's confession at arrest, the victim's identification of the defendant, and his juvenile record. *Edwards*, 430 A.2d at 1324.

One commentator has suggested that, rather than setting up a standard of proof, Congress, by its inclusion of the "clear and convincing" factor, was referring to the nature of the evidence provided by the prosecutor. By referring to the *nature* of the evidence, "Congress may have intended only for the government to establish a sound evidentiary basis in proving by a preponderance of the evidence . . . ." Serr, *The Federal Bail Reform Act of 1984: The First Wave of Case Law*, 39 ARK. L. REV. 169, 190 (1985).

33. 18 U.S.C. § 3142(i)(1) (1986).

34. United States v. Salerno, 794 F.2d 64, 66 (2d Cir. 1986).

35. *Liberty in the Balance*, *supra* note 4, at 381 n.32.

of flight, it moved for the pretrial detention of Salerno and Cafaro because their release, regardless of any possible restrictions or conditions, would pose a threat to the safety of the community.[36]

After a two-day detention hearing, the United States District Court for the Southern District of New York ordered the defendants detained pending trial. The court based its decision on a finding that the release of the defendants would not assure public safety.[37] The defendants appealed the decision,[38] contending that the provision permitting detention solely on the premise of future criminal conduct violated due process. The Court of Appeals for the Second Circuit agreed[39] and vacated the order for detention.[40] The appellate court believed that preventive detention is "constitutionally infirm" because "*the total deprivation of liberty as a means of preventing future crimes exceeds the substantive limitations of the Due Process Clause.*"[41] The Supreme Court granted certiorari.[42] The Court's obvious eagerness to hear the *Salerno* case and settle the issues surrounding the Bail Reform Act has not gone unquestioned,[43] especially in light of some suggestions that

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36. *Salerno*, 794 F.2d at 66.

37. United States v. Salerno, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986).

38. *Salerno*, 794 F.2d at 64.

39. *Id.* at 68, 71.

40. "We regard § 3142(e)'s authorization of pretrial detention on this ground as repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id.* at 71-72.

41. *Id.* at 72 (emphasis in original). The Court stated that "*[i]t cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.*" *Id.* (emphasis in original). To uphold § 3142(e)'s preventive detention provision would:

> create the anomaly that a person who has been charged with crimes but not yet convicted may be incarcerated on the ground that he will commit crimes in the future, whereas persons who have been neither charged with nor convicted of crimes, or have served their sentence of conviction on those charges, may not be incarcerated on the basis of such a prediction.

Id. at 73.

42. United States v. Salerno, 481 U.S. 739 (1987).

43. It was noted that:

> because of the strength of the government's case, the Court may be reluctant to relinguish [sic] the opportunity to decide *Salerno*. In *Salerno*, for example, the Court need not confront the difficult issue of the constitutionality of indefinite pretrial detention, the defendants' having been detained a mere three months; Salerno himself, the longtime don of one of the nation's leading crime families, is clearly the sort of 'dangerous' defendant against whom Congress expected the Act to apply; and, finally, the conviction, by ratifying the pretrial finding of dangerousness, may militate indirectly in favor of reversal.

Liberty in the Balance, *supra* note 4, at 381 n.32. Prior to this review, Salerno was found guilty after a jury trial on unrelated charges. *Salerno*, 481 U.S. at 756 (Marshall, J.,

the Court's jurisdiction in this matter was, in fact, improper.[44]

B. Analysis

1. The Test for Defining Punishment

The test chosen by the Court to define the boundaries of "punishment" as opposed to "regulation" is critical to the final determination of whether or not preventive detention comports with the requirements of due process. The Court stated that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[45] In terms of the due process analysis, the constitutionality of such detention turns on the definition of punishment. If preventive detention is considered punishment, it is constitutionally invalid; if it is considered only regulation, such detention comports with due process restrictions.

In *Kennedy v. Mendoza-Martinez*,[46] the Court created an elaborate test to define punishment when no clear legislative intent to punish is present. The significant factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*,

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dissenting).

44. Marshall, in his dissent, was quick to point out that:

> [o]n January 13, 1987, Salerno was sentenced on [unrelated] charges to 100 years' imprisonment. As of that date, the Government no longer required a pretrial detention order for the purpose of keeping Salerno incarcerated; it could simply take him into custody on the judgment and commitment order. The present case thus became moot as to respondent Salerno.

Salerno, 481 U.S. at 756 (Marshall, J., dissenting).

> The Government thus invites the Court to address the facial constitutionality of the pretrial detention statute in a case involving two respondents, one of whom has been sentenced to a century of jail time in another case and released pending appeal with the Government's consent, while the other was released on bail *in this case*, with the Government's consent, because he had become an informant.

Id. at 758 (emphasis in original)(Marshall, J., dissenting).

Justice Marshall also pointed out that this raises "a substantial question as to the Court's jurisdiction, for it is far from clear that there is now an actual controversy between these parties." *Id.* "The elementary requirement of an actual case or controversy for the exercise of federal judicial power is imposed in Article III of the Constitution." United States v. Edwards, 430 A.2d 1321, 1347 (D.C. App. 1981)(Nebeker, J., concurring in part and dissenting in part), *cert. denied*, 455 U.S. 1022 (1982). Although these concerns are moot at this point, the fact that the Court stretched to find jurisdiction in *Salerno* casts doubt upon the Court's real interest in this case, and upon the legitimacy of its reasoning and conclusions.

45. Bell v. Wolfish, 441 U.S. 520, 535 (1979).

46. 372 U.S. 144 (1963).

> whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose . . . .[47]

In *Bell v. Wolfish*,[48] while acknowledging that these factors "provide useful guideposts" in determining the scope of punishment,[49] the Court disregarded all but the final two factors — "whether an alternative purpose to which . . . [it] may rationally be connected is assignable for it"[50] and "whether it appears excessive in relation to the alternative purpose."[51] In essence, the Court created a "rational connection" test.[52] In *Bell*, the Court stated that as long as the conditions of pretrial detention are "reasonably related" to a legitimate governmental interest, it does not fall within the definition of punishment.[53]

This "reasonably related" approach to punishment was used by the *Salerno* Court. Thus, the Court's first and most dominate concern became the nature of the legislative intent. More specifically, the Court was concerned with whether "Congress expressly intended to impose punitive restrictions."[54] The Court had no difficulty concluding that "[t]he legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals."[55] This conclusion essentially determined the issue of whether preventive detention was violative of due process. After concluding that Congress did not intend pretrial detention to be a punitive restriction, the Court simply needed to find an "alternate purpose" and determine that the means chosen for implementation were not excessive in relation to that purpose. By recognizing prevention of danger to the public as "a legitimate regulatory goal,"[56] the Court established the "alternative purpose" for which preventive detention may be rationally connected. By establishing that "[t]he gov-

47. *Id.* at 168-69 (footnotes omitted)(emphasis in original).
48. 441 U.S. 520 (1979).
49. *Id.* at 538.
50. *Id.*
51. *Id.*
52. *Liberty in the Balance*, *supra* note 4, at 391.
53. *Bell*, 441 U.S. at 539.
54. *Salerno*, 481 U.S. at 747.
55. *Id.*
56. *Id.* (citing Schall v. Martin, 467 U.S. 253 (1984)).

ernment's interest in preventing crime by arrestees is both legitimate and compelling,"[57] the Court swiftly diffused the issue of excessiveness.[58] Once that government interest was considered not only legitimate but compelling, and once the Court found that the procedural safeguards in the Act comported with procedural due process, the means chosen to further that interest could not be considered excessive.

The Court's extreme reliance on legislative intent seems inappropriate for an issue as important as an individual's freedom from punishment prior to an adjudication of guilt. To accept the express words of Congress without further analysis risks acceptance based on only the superficial character of the Act. Such a possible oversight is inexcusable when considering the fundamental right of liberty guaranteed by the fifth amendment. As the Court has previously expressed, "even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute."[59]

The true intent of Congress in enacting the Bail Reform Act was not as simple or straightforward an issue as Chief Justice Rehnquist represented. Preventive detention was a "no lose" situation for the legislature — to most constituents a vote in favor of preventive detention was a vote against crime, and those citizens most adversely affected by the provision were not in a position to gain the attention of either Congress or the public.[60] In this type of "no lose" situation, the legitimacy of the provision cannot be determined without a more exhaustive analysis. When the system operates to detain individuals who, in fact, would not have posed any threat to society, "its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophecy that is thought to warrant it, while any

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57. *Id.* at 749, (citing De Veau v. Braisted, 363 U.S. 144, 155 (1960)). The Court went even further to state that:

> [w]hile the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

Id. at 750.

58. *Id.* at 751.

59. *As Time Goes By*, *supra* note 4, at 1081 (quoting Trop v. Dulles, 356 U.S. 86, 95 (1958)).

60. *Loss of Innocence*, *supra* note 4, at 814.

decision to release may be refuted by its results."[61]

In addition, it was asserted that the Bail Reform Act was a reaction to public outrage over a "crime wave" which was "sweeping the country."[62] Commenting on the preventive detention provision of the District of Columbia Reform and Criminal Procedure Act of 1970,[63] Senator Sam Ervin stated that such detention is "an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem."[64] Under these circumstances, the judiciary should be watchful that the legislature did not merely find a "simple solution" at the expense of due process of law.[65] The *Salerno* Court, however, refused to scrutinize legislative intent or examine the congressional solution, and therefore, only added to a "complex problem."

The Court's reliance on legislative intent and a restrictive definition of punishment in reaching its decision is unsupportable in light of the circumstances and critical issues presented before it. The Court cannot, after recognizing that due process will not allow punishment prior to adjudication, "point to the difficulty of the task [of distinguishing punishment from regulation] as a justification for confining the scope of punishment concept so narrowly that it effectively abdicates . . . the judicial responsibility to enforce the guarantees of due process."[66] The Court's emphasis on legislative intent distorts the scope of review of the punishment issue. The Court now "defines [punishment] by reference to the

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61. Tribe, *supra* note 4, at 375. Since the system of preventive detention plays on society's fears of dangerous pretrial misconduct by offenders, it will always be viewed as successful. When an offender engages in pretrial misconduct, society's belief in the need for detention is validated. On the other hand, the overly broad detention of offenders who could have been safely released is hidden from society's view. *Id. See also Rebuttable Presumption, supra* note 4, at 700; *Loss of Innocence, supra* note 4, at 814.

62. The Bail Reform Act was "enacted at least partially in response to the perception that a crime wave committed by persons on pretrial release was sweeping the country . . . ." *Loss of Innocence, supra* note 4, at 805 (citing S. REP. No. 225, 98th Cong., 2d Sess. 6, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3188.

63. D.C. CODE ANN. § 23-1322 (1981).

64. Ervin, *supra* note 4, at 292.

65.

> [I]f society is disturbed by civil commotion — if the passions of men are aroused and the restraints of law weakened, if not disregarded — these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty . . . .

Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 124 (1866).

66. Bell v. Wolfish, 441 U.S. 520, 584 (1979) (Stevens, J., dissenting).

government's purpose, not to the impact on the accused."[67] Yet, this approach is improper under the Constitution because the analysis should concern effect, not intent.[68] The Court has previously shown a willingness to look beyond legislative labels and to more closely examine the nature of the incarceration in analyzing the requirements of due process.[69] The fact that the regulation-punishment distinction is difficult to make is precisely why the *Salerno* Court should have given more care to its analysis.

Since preventive detention results in a deprivation of freedom, it grows dangerously close to punishment. To limit the definition of punishment to retribution is inflexible. Punishment has traditionally served many functions: retribution, rehabilitation, deterrence, and prevention.[70] In fact, the Court stated that one of the predominant reasons for imprisoning those convicted of crimes is " 'to keep them from inflicting future harm,' " but the Court also cautioned, " 'that does not make imprisonment any the less punishment.' "[71] In a society built upon the idea that there are fundamental rights inherent in human dignity, the withdrawal of these "rights is itself among the most basic punishments . . . for such a

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67. United States v. Edwards, 430 A.2d 1321, 1354 (D.C. App. 1981)(Ferren, J., concurring in part and dissenting in part), *cert. denied*, 455 U.S. 1022 (1982).

68. "By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. If this concern is to be vindicated, it is the effect of the conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis." *Bell*, 441 U.S. at 567 (Marshall, J., dissenting). "[W]ith the rights of presumptively innocent individuals at stake, we cannot abdicate our judicial responsibility to evaluate independently the Government's asserted justifications for particular deprivations." *Id.* at 571 (Marshall, J., dissenting).

69. In *In re* Gault, 387 U.S. 1 (1967), while examining the necessary procedural safeguards involved in juvenile detention situations, the Court looked beyond the language supplied by the legislature in order to determine the *effect* of the detention.

> The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.

Id. at 27.

The Court also stated that the detention of juveniles involves the deprivation of liberty interests which are less substantial than those involved in the detention of adults. *See infra* notes 108-15 and accompanying text. Upon recognizing this distinction, it seems to follow that the Court would be more willing to look to the actual effect of detention when adults are involved, rather than less willing.

70. *Liberty in the Balance, supra* note 4, at 392 (citing United States v. Brown, 381 U.S. 437, 458 (1965)).

71. United States v. Melendez-Carrion, 790 F.2d 984, 999 (1986)(quoting United States v. Brown, 381 U.S. 437, 458 (1965)).

withdrawal qualifies the subject's citizenship and violates his dignity. Without question that kind of harm is an 'affirmative disability' that 'has historically been regarded as a punishment.' "[72]

The fact that detention entails a withdrawal of rights is unquestionable. "[C]onfinement . . . limits these retained constitutional rights. . . . This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual."[73] To put detainees on equal footing with convicted prisoners, who are unquestionably being punished, throws serious doubt upon the assertion that detention is not punishment. Where two people are equally incarcerated, to argue that one is being punished but the other is not seems absurd.

If the Court had applied the full *Mendoza-Martinez* test,[74] rather than the limited version presented in *Bell*, it is doubtful that it would have reached the same conclusion on the punishment-regulation question. As discussed above, the withdrawal of fundamental rights by incarceration is unquestionably an affirmative disability.[75] Certainly this withdrawal, due to imprisonment, has "historically been regarded as punishment."[76] Normally, preventive detention may only be invoked on "a showing of *scienter* — that is, only if there is clear and convincing evidence of the defendant's propensity to commit violent, criminal acts in the future."[77] To consider whether preventive detention furthers the "traditional aims of punishment,"[78] "[i]t would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent — and preventive."[79] Detention obviously serves as a deterrent; when one is incarcerated, committing a crime becomes impossible.[80] Applying this analysis to the case of preventive detention, leads to the result that preventive detention is "punishment" rather than "regula-

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72. *Bell*, 441 U.S. at 589-90 (footnote omitted) (Stevens, J., dissenting).

73. *Id.* at 546 (citations omitted).

74. *See supra* note 47 and accompanying text.

75. *Loss of Innocence*, *supra* note 4, at 817. "It is difficult to conceive of a situation where pretrial detention would not lead to an affirmative disability." *Id.*

76. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)(footnote omitted).

77. *Liberty in the Balance*, *supra* note 4, at 392 (footnote omitted (emphasis in original)).

78. *Kennedy*, 372 U.S. at 168.

79. United States v. Brown, 381 U.S. 437, 458 (1965).

80. *See Liberty in the Balance*, *supra* note 4, at 392 ("[I]ncapacitation is technically a species of deterrence; when incapacitated, one cannot commit a crime.").

tion." Although the *Mendoza-Martinez* analysis is complicated and lengthy, in light of the importance of the accused's freedom, the Court's use of the "rational connection" test seems inadequate.

2. Ability to Predict — A Valid Means to Achieve the End?

Even if one assumes that the goal of preventive detention is regulation, rather than punishment, there is another equally tenuous presumption on which the Bail Reform Act rests. Fundamental to the classification of persons as "dangerous" is the presumption that such behavior can accurately be predicted.[81]

The Court stated that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."[82] The Court buttressed this assertion by pointing to instances where predictions of future behavior are an important element of judicial decisions.[83] These examples, however, involve predicting the behavior of a convicted person. Judicial officers may consider the fact of conviction in their predictions of future criminal conduct where the person was found guilty beyond a reasonable doubt. This is not the case, however, where the individual is not yet convicted. "A prediction of future action concerning a person who has been convicted is fundamentally different . . . than predicting the behavior of an as yet innocent person."[84]

The Court also asserted that the procedures and guidelines by which the judicial officer predicts the likelihood of future criminal conduct "are specifically designed to further the accuracy of that determination."[85] The factors which the Bail Reform Act specifically designates for consideration,[86] however, were not designed specifically as guides for predicting future criminal behavior, but

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81. United States v. Edwards, 430 A.2d 1321, 1369 (D.C. App. 1981)(Mack, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982).

82. Schall v. Martin, 467 U.S. 253, 278 (1984). "[W]e have specifically rejected the contention . . . that it is impossible to predict future behavior and that the question is so vague as to be meaningless." *Id.* at 278-79 (citation omitted).

83. *Id.* at 278-79.

Examples include: "judicial evaluation of a death sentence imposed by a jury, grants of parole, revocation of parole, and the imposition of an increased sentence under the 'dangerous special offender' statute." *Constitutional but Ineffective*, *supra* note 4, at 453 (citing *Schall*, 467 U.S. at 278 n.30).

84. *Loss of Innocence*, *supra* note 4, at 823.

85. United States v. Salerno, 481 U.S. 739, 751 (1987).

86. 18 U.S.C. § 3142(g) (1986).

were created in the Bail Reform Act of 1966[87] to help evaluate the risk of flight from prosecution.[88] Therefore, the "usefulness [of the factors provided in the 1984 Act] in predicting future crime, at least so far as could be known, might only be as great as the color of hair, the height and weight, and the age of the defendant."[89]

Even with appropriate guidelines, there is no indication that a judicial officer, "unversed in the subtleties of behavior prediction,"[90] would be able to accurately predict future criminal conduct. Even those who are professionally trained in behavioral studies cannot make such determinations.[91] In *Barefoot v. Estelle*,[92] the American Psychiatric Association (APA), participating as amicus curiae, stated that within the psychiatric field it is well established that professional predictions of future dangerousness are unreliable.[93] The APA also suggested that no one, whether professional or lay person, has shown an ability to reliably predict future criminal conduct.[94] While academic research has focused on the predictive capabilities of medical professionals, it would be unrealistic to believe or expect judges to do what psychiatrists and psychologists have been unable to do.[95] In fact, judicial officers are subject to extrinsic pressures, not felt by the psychiatrist or psychologist, which could also adversely affect the accuracy of their predictions. Judicial officers are subject to "a tendency to resolve

87. The Bail Reform Act of 1966, Pub. L. No. 89-465, §§ 3(b), 5(e)(1), 80 Stat. 214, 216, 217, *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203, 98 Stat. 1837, 1976.

88. *Id.* The Bail Reform Act of 1984 added past conduct as one additional factor. *See also* Ervin, *supra* note 4, at 295.

89. Ervin, *supra* note 4, at 295.

90. *Loss of Innocence*, *supra* note 4, at 813.

91. "John Monahan has written, 'Rarely have research data been as quickly or nearly universally accepted by the academic and professional communities as those supporting the proposition that mental health professionals are highly inaccurate at predicting violent behavior.'" Alschuler, *supra* note 4, at 538 (quoting J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 27 (1981)).

92. 463 U.S. 880, *reh'g denied*, 464 U.S. 874 (1983).

93. *Id.* at 920 (Blackmun, J., dissenting). "'The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.'" *Id.* (quoting Brief for American Psychiatric Association as Amicus Curiae at 12).

94. United States v. Edwards, 430 A.2d 1321, 1370 (D.C. App. 1981)(Mack, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982). "'Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or "dangerousness."'" *Id.* (quoting AMERICAN PSYCHIATRIC ASSOCIATION, TASK FORCE REPORT ON THE CLINICAL ASPECTS OF VIOLENT INDIVIDUALS 28 (1974)).

95. Alschuler, *supra* note 4, at 539.

doubts within these categories in favor of detention, in part because judges could thereby make fewer demonstrable mistakes."[96]

Consequently, the prediction of future criminal behavior is risky at best. Due to the high level of inaccuracy, "[a]ny policy of preventive detention likely to substantially reduce the amount of crime could require the detention of many people who would not commit crimes if released."[97] A number of studies on the predictability of future criminal behavior have undercut a number of the arguments upon which preventive detention rests.[98] Most importantly, these studies suggest that the presumption of predictable future criminal behavior is invalid. To say that eight individuals must be improperly detained in order to ensure the proper detention of one,[99] or even that two must be held for one,[100] is unac-

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96. Tribe, *supra* note 4, at 382.

97. Alschuler, *supra* note 4, at 546-47.

98. Senator Ervin analyzed the National Bureau of Standards Study which tested predictability under the D.C. Statute (the mirror image of the Act of 1984 except that the D.C. Statute includes a strict detention limitation of 60 days). He found a number of contradictions in the theories use to support preventive detention. First, the rate of pre-trial crime, including both felonies and misdemeanors, was extremely low at 17%, but was only 5% when considering only successive arrests for felonies. Second, the study found no correlation between the type of crime for which the first and second arrests were made. Third, most recidivism did not occur in the period soon after arrest. Finally, prediction of criminal behavior is unreliable at best. Ervin, *supra* note 4, at 294-95 (construing Locke, Penn, Rick, Burten & Hare, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study*, in NAT'L BUREAU STAND. TECH. NOTE 535 (1970)).

The Harvard Study, also concerning the D.C. statute, has equally critical results. *Empirical Analysis*, *supra* note 4, at 308. The study considered 427 arrestees whose backgrounds would subject them to preventive detention. Of these, 62 (14.5%) were rearrested, 41 (9.6%) were rearrested and convicted, 33 (7.7%) were rearrested for serious or violent crimes, but only 22 (5.2%) were rearrested and convicted for dangerous or violent crimes. *Id.* To evaluate these recidivists, the study contained two "dangerousness scales," which awarded point values for each factor considered in the prediction analysis in an attempt to determine if recidivists had common characteristics. *Id.* at 313-16. Under the first scale, based on a subjective assessment, only 25.7% of the 70 highest scores (intended to represent the 70 most dangerous) were recidivists. *Id.* In order to successfully detain every recidivist, it would be necessary to detain eight non-recidivists for each recidivist. *Id.* The second scale, "using a statistical technique, [of] readjusting the weights of the variables on the basis of their actual correlations to recidivism," did not fare much better. *Id.* at 310. At no point on the scale would more recidivists be detained than non-recidivists. *Id.* at 316. In order to detain all 41 recidivists it would be necessary to detain 266 arrestees of which 225 posed no threat. *Id.* at 316.

In a study compiled by Professor Ewing, evidence indicated that predictions would be correct 50% of the time, at best. *Constitutional but Ineffective*, *supra* note 4, at 456-57 (construing Ewing, *Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass*, 34 BUFFALO L. REV. 173, 200-05 (1985)).

99. *Empirical Analysis*, *supra* note 4, at 314.

ceptable and excessive in light of the legislative goal. If the goal is to detain recidivists, incarcerating non-recidivists is in excess of what is necessary to further the regulatory goal.[101] Our system is premised on the belief that ten guilty men should go free before one innocent man is condemned.[102] Consequently, this maxim does not allow society to "knowingly sacrifice innocent men so long as the terms of the trade are sufficiently favorable to the community as a whole."[103] As with the punishment-regulation issue, the Court avoided addressing the legality of excessive detention.

3. Reliance on Previous Case Law

In reaching its decision, the *Salerno* Court relied in part on previous instances where the government's interest in community safety was held to outweigh the individual's interest in liberty.[104] Specifically, the Court relied on its decision in *Schall v. Martin*.[105] In *Schall*, the Court approved the pretrial detention of juveniles who presented a danger to the community.[106] The case involved a challenge to the New York Family Court Act which authorized the pre-trial detention of a juvenile delinquent when there was a " 'serious risk' that the child 'may before the return date commit an act which if committed by an adult would constitute a crime.' "[107]

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100. *Constitutional but Ineffective*, *supra* note 4, at 456-57.

101. "[I]f protection of society is alleged to be the alternate purpose of the 1984 Act then the sanction involved is clearly excessive in view of the minimal success the detention provisions will have in furthering their goal." *Loss of Innocence*, *supra* note 4, at 818.

102. Tribe, *supra*, note 4, at 385.

103. *Id.* at 385-86.

104. United States v. Salerno, 481 U.S. 739, 748 (1987).

These examples, however, are not wholly convincing. Two of the examples given — detention of mentally unstable persons who represent a danger to society, Addington v. Texas, 441 U.S. 418 (1979) and detention of dangerous defendants who are incompetent to stand trial, Jackson v. Indiana, 406 U.S. 715, 731-739 (1972), Greenwood v. United States, 350 U.S. 366 (1956) — involved different circumstances and concerns than those posed by the detention of competent individuals.

> There is a striking difference between the involuntary confinement of an individual who is considered dangerous for reasons beyond his control and the involuntary confinement of one who is thought to be capable of conforming his conduct to the requirements of law but is suspected of being unwilling to do so.

Tribe, *supra* note 4, at 379. This type of imprisonment which rests on the "assumption that [the criminal offenders] will make the wrong choice impairs the personal autonomy in a way that incarceration of the dangerously ill does not." *Id.*

105. 467 U.S. 253 (1984).

106. *Id.* at 256-57.

107. *Id.* at 255 (quoting N.Y. JUD. LAW § 320.5(3)(b) (McKinney 1983)).

The Court, acknowledging that "the Constitution does not mandate elimination of all difference in the treatment of juveniles,"[108] was quick to point out that although the liberty interest of a juvenile is substantial[109] this interest is a "qualified interest."[110] The Court recognized that, unlike adults, juveniles are "always in some form of custody,"[111] and thereby implied that their detention would not create the same deprivation of liberty as would the detention of an adult. Juveniles are assumed to be incapable of caring for themselves; therefore, if parental guidance fails the state must step in.[112] The juvenile's interest in liberty is "subordinated to the State's '*parens patriae* interest in preserving and promoting the welfare of the child.' "[113] The "*parens patriae*" interest of the state was fundamental to the *Schall* Court's analysis.[114] The Court both acknowledged and in large measure based its decision on the distinction this interest brings to juvenile proceedings. The Court commented that this interest "makes a juvenile proceeding *fundamentally* different from an adult criminal trial."[115]

Concerning itself mainly with the distinction between adults and juveniles, the Court left open a critical question regarding the Bail Reform Act — "whether the considerations justifying preventive detention of juveniles apply equally to adults."[116] The detention of adults poses different issues[117] and consequently mandates a different analysis. In adult preventive detention systems the only predicate for detention, other than a prediction of behavior, is the existence of an act which led to the criminal charge — "an act not yet established by proof beyond a reasonable doubt or

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108. *Schall*, 467 U.S. at 263.

109. *Id.* at 265.

110. *Id.* The Court acknowledged that juveniles have a substantial interest in freedom from institutional restraints, "[b]ut that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of [parental] custody." *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

114. In fact, the Court framed the issue before it as the decision of "whether, in the *context of the juvenile system*, the *combined interest* in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention." *Schall*, 467 U.S. at 264 (emphasis added).

115. *Id.* at 263 (emphasis added).

116. *Rebuttable Presumption*, *supra* note 4, at 706.

117. Alschuler, *supra* note 4, at 535. "Although full-time institutional confinement restricts juveniles as much as adults, the deprivation of liberty may be somewhat less for juveniles because juveniles have somewhat less liberty to begin with." *Id.*

even by a preponderance of the evidence."[118] In the juvenile preventive detention system, however, "the predicate is both an act and a status, a status that suggests an incomplete ability to control assertedly dangerous behavior."[119] Moreover, the fact that the Court found a juvenile's interest in liberty to be substantial[120] logically implies that the liberty interest of an adult must be even greater.[121]

The *Salerno* opinion, however, fails to recognize these fundamentally logical conclusions. Although the Court acknowledged that the government's "concern with crime prevention is no less compelling when the suspects are adults,"[122] it ignored its own language in *Schall* which suggested that the liberty interest of an adult is greater than that of a juvenile. Since the *Schall* decision relied upon the distinctions inherent between adults and juveniles, the *Salerno* Court's reliance on *Schall* is misplaced and improper as applied to adult pre-trial detention.[123]

4. The Bail Clause of the Eighth Amendment

The eighth amendment to the Constitution mandates that "[e]xcessive bail shall not be required."[124] As the *Salerno* majority noted, however, "[t]his Clause, of course, says nothing about whether bail shall be available at all."[125] In an attempt to discern the scope of the bail clause, the Court turned to language in *Carlson v. Landon*[126] which attempted to set the parameters of the clause by studying its history.

> The bail clause was lifted with slight changes from the English Bill of Rights Act. . . . [T]hat clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.[127]

To rely so heavily on the history of the English Bill of Rights,

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118. *Id.*
119. *Id.*
120. *See supra* note 109 and accompanying text.
121. *Loss Of Innocence*, *supra* note 4, at 815.
122. United States v. Salerno, 481 U.S. 739, 749 (1987).
123. *Liberty in the Balance*, *supra* note 4, at 397.
124. U.S. CONST. amend. VIII.
125. *Salerno*, 481 U.S. at 752.
126. 342 U.S. 524 (1952).
127. *Salerno*, 481 U.S. at 754 (quoting *Carlson*, 342 U.S. at 545-46).

however, does injustice to the history and philosophy behind our own. While much of our philosophical foundation is based in English law, the Court does not take into account the differences between the English and American systems. While Parliament exercises absolute control over individual rights, the American system is one of limited government with powers which are "delegated by the people and circumscribed by enumerated individual liberties."[128] With this in mind, it is inconceivable that the bail clause was "drafted with the idea of isolating Congress from its restraints,"[129] or to suggest that "the legislature and not the Constitution is the real framer of bail law."[130] While these suggestions may be consistent with the English theory of citizen's rights where Parliament has "ultimate authority,"[131] they "would be totally inconsistent with a Bill of Rights concerned almost exclusively with curtailing the powers of Congress."[132]

Turning to the history of the bail clause in America, preventive detention is unprecedented. Until the passage of the Bail Reform Act, the Judiciary Act of 1789 guaranteed the right of bail to all persons not charged with a capital federal offense.[133] Admittedly, the right to bail was denied in circumstances where the defendant's presence at trial could not be assured[134] or when it was feared that the defendant would obstruct the judicial process.[135]

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128. United States v. Edwards, 430 A.2d 1321, 1367 (D.C. App. 1981)(Mack, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982).

> History fails as a meaningful tool of legal interpretation and becomes merely a recitation of facts unless it can be presumed that individuals learn from it. It is "well known that our Bill of Rights was written and adopted to guarantee Americans greater freedom than had been enjoyed by their ancestors . . . ."

Id. at 1366 (quoting *Carlson*, 342 U.S. at 557 (Black, J., dissenting)).

129. *Edwards*, 430 A.2d at 1367 (Mack, J., dissenting).

130. Lager, *Beyond Bond: The Federal Bail Reform Act of 1984*, 59 CONN. B.J. 349, 358 (1985).

131. Tribe, *supra* note 4, at 400.

132. *Id.*

133. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 91. Persons charged with capital federal offenses were considered more likely to flee prior to trial due to the severity of the charges against them.

134. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203, 98 Stat. 1837, 1976. *See also* Jordan, *Focus on the 1984 Bail Reform Act: Pretrial Detention Permitted*, 9 BLACK L.J. 280, 283 (1986); Tribe, *supra* note 4, at 376-77; *Loss of Innocence*, *supra* note 4, at 807; *Rebuttable Presumption*, *supra* note 4, at 695 n.9; *Liberty in the Balance*, *supra* note 4, at 383; Note, *Pretrial Preventive Detention Under the Bail Reform Act of 1984*, 63 WASH. U.L.Q. 523, 532 (1985) [hereinafter *Pretrial Preventive Detention*].

135. Lager, *supra* note 130, at 349 n.4; *Loss of Innocence*, *supra* note 4, at 807; *Rebuttable Presumption*, *supra* note 4, at 695 n.9; *As Time Goes By*, *supra* note 4, at

These exceptions, however, were justified by the need to ensure the integrity of the judicial process.[136]

> [W]e have realized that a deterrent system cannot function at all unless society can successfully prosecute lawbreakers. Hence we have traditionally detained individuals likely to flee or otherwise avoid prosecution. This limited form of pretrial detention is considered essential to the preservation of a system that seeks to control crime by threatening subsequent punishment rather than by imposing prior imprisonment. It does not however, provide precedent for [preventive detention].[137]

The Court's analysis in *Salerno*, disregards the role of the bail clause in ensuring the right of the individual to the presumption of innocence.[138] The traditional right to pretrial freedom, with the limited exceptions discussed above, "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[139] This presumption of innocence also represents:

> a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community. Only those deprivations necessary to assure the progress of the proceedings against him — deprivations which do not rest on any assumption of guilt — may be squared with this basic postulate of dignity and equality.[140]

Even though the bail clause does not confer an absolute right to bail, analysis should not stop there. The fact that bail was specifically mentioned as a right warranting constitutional protection, suggests that it is "sufficiently fundamental" to justify a more exacting examination than the one provided in *Salerno*.[141] The

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1072; *Liberty in the Balance*, *supra* note 4, at 383; *Pretrial Preventive Detention*, *supra* note 134, at 532.

136. Tribe, *supra* note 4, at 377; *Loss of Innocence*, *supra* note 4, at 807; *Liberty in the Balance*, *supra* note 4, at 383; *Pretrial Preventive Detention*, *supra* note 134, at 533.

137. Tribe, *supra* note 4, at 376-77.

138. The majority's decision "arises from a specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence." United States v. Salerno, 481 U.S. 739, 763 (1987)(Marshall, J., dissenting). *See* Stack v. Boyle, 342 U.S. 1, 4 (1951)("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

139. *Stack*, 342 U.S. at 4.

140. Tribe, *supra* note 4, at 404.

141. *Empirical Analysis*, *supra* note 4, at 336-37. *See Rebuttable Presumption*, *supra* note 4, at 730

Court explained that "[t]he only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."[142] Yet, rather than truly examining the question of "excessiveness," the Court diffused the issue by merely finding the government interest in pre-trial detention "compelling" and explaining that the language of the bail clause does not confer an absolute right.[143] If the problem of excessiveness is reconsidered in light of the mere regulatory goal of pre-trial detention,[144] it again appears as though the Court avoided the inconvenient issues.

The Court's analysis suggests that Congress can decide whether or not bail should be granted. If bail is considered appropriate, then the Constitution requires that such bail cannot be excessive. This type of logic, however, is "a classic example of the cart pulling the horse since the Congress could abrogate the right to bail altogether, making the Eighth Amendment absolutely meaningless."[145] As Justice Marshall explained, "[i]f excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether . . . the consequences are indistinquishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter."[146]

CONCLUSION

Although Justice Marshall's characterization of the *Salerno* majority opinion and its conclusions as "worthless"[147] is perhaps a bit harsh, such a condemnation is not without merit. Chief Justice Rehnquist was presented with a critical issue of constitutional measure and yet treated it with the casualness of a cursory dismissal. The Court was obviously eager to decide this issue but should not have allowed this eagerness to pervade its reasoning. The result was an opinion not worthy of the fundamental issue presented

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("The right to bail . . . may or may not be implicit in the Constitution but it is so essential to the preservation of the right to liberty that it may only be impinged in order to further a compelling government interest.").

142. *Salerno*, 481 U.S. at 754.

143. *See supra* notes 56-58 and 125 and accompanying text.

144. *See, supra* notes 98-103 and accompanying text.

145. United States v. Edwards, 430 A.2d 1321, 1365 (D.C. App. 1981)(Mack, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982).

146. *Salerno*, 481 U.S. at 760-61 (Marshall, J., dissenting).

147. *See supra* note 7 and accompanying text.

or of the Court. The Court's analysis and "supporting" case law do not provide an adequate basis for this startling conclusion. The Court's incomplete analysis leaves unsettling questions regarding both the propriety and the validity of its decisions. At the very least, the Court should have acknowledged and examined the difficult and perhaps inconvenient issues raised above. Whether such an examination would have resulted in a different conclusion cannot be known, but the importance of the issue presented warranted a more indepth analysis. Undoubtedly, the Court has not seen the last of this issue. The Court's insufficient analyses and arguments suggest and mandate the reassessment of this matter by the Court. It is hoped that when the Court is presented with the issue of preventive detention again, it will acknowledge and answer the admittedly difficult but necessary questions required by this important constitutional issue.

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